

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS**

)	
The HipSaver Company, Inc.,)	
Plaintiff,)	
)	
v)	
)	
J.T. Posey Company,)	
Defendant)	
)	
<hr style="border: 0.5px solid black;"/>)	Civil Action No. 05-10917 PBS
)	
J.T. Posey Company, Inc.,)	
Counterclaim Plaintiff)	
)	
v)	
)	
The HipSaver Company, Inc. and)	
Edward L. Goodwin,)	
Counterclaim Defendants)	
)	
<hr style="border: 0.5px solid black;"/>)	

**PLAINTIFF’S ASSENTED-TO MOTION FOR LEAVE TO FILE A
REPLY IN FURTHER SUPPORT OF ITS MOTION TO AMEND COMPLAINT**

Plaintiff The HipSaver Company (“HipSaver”) moves, pursuant to Local Rule 7.1(B)(3), for leave to file a short reply memorandum further supporting its Motion to Amend The Complaint and addressing arguments raised by defendant in its Opposition to this Motion. HipSaver believes that the reply memorandum, attached hereto as Exhibit 1 will aid the Court in its decision whether to grant leave to Plaintiff to amend its complaint.

Therefore, HipSaver respectfully requests leave of this Court to file the reply memorandum attached hereto as Exhibit 1.

CERTIFICATE PURSUANT TO CIVIL LOCAL RULE 7.1

I hereby certify that on December 21, 2005, counsel for the parties conferred by e-mail and that counsel for J.T. Posey assented to this motion.

THE HIPSAVER COMPANY, INC.
By its Attorneys,

/s/ Courtney M. Quish

Lee Carl Bromberg

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Dated: December 22, 2005

02820/00502 454823.1

EXHIBIT 1

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS**

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The HipSaver Company, Inc.,)	
Plaintiff,)	
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J.T. Posey Company,)	
Defendant)	
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J.T. Posey Company, Inc.,)	
Counterclaim Plaintiff)	
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v)	
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The HipSaver Company, Inc. and)	
Edward L. Goodwin,)	
Counterclaim Defendants)	
)	
)	

**PLAINTIFF'S REPLY IN FURTHER SUPPORT OF
ITS MOTION TO AMEND THE COMPLAINT**

The Defendant's statute of limitations and release claims are groundless. Only after repeated attempts to collect documents through discovery did Plaintiff HipSaver discover a distinct example of Posey's tortious and flagrant false and disparaging statements. These false and disparaging statements were circulated through private e-mail messages sent to individuals at the Veterans Administration, one of the health care industry's leading consumers of fall prevention products. Upon discovering these communications, HipSaver immediately sought leave to amend its complaint to incorporate a claim of product disparagement. The product disparagement claim is timely brought, and leave to amend should be granted under Fed. R. Civ. P. 15(a).

A. HipSaver's Claim is Not Barred By the Statute of Limitations

HipSaver's claim is not barred by the statute of limitations because the e-mail correspondence basis for the new allegation was inherently unknowable until it was produced late in discovery. Defendant Posey produced the e-mail and attachment on November 7, 2005. Plaintiff's attorneys discovered the document on November 17, 2005 and filed a motion requesting leave to amend on December 2, 2005. The statute of limitations under Massachusetts General Laws Ch. 260 s. 2A begins to run only when the prospective plaintiff learns or should have learned that he or she has been injured. Thus, under Massachusetts discovery rule, the limitations period should be tolled where the facts were "inherently unknowable" to the injured party. *See Flotech, Inc. v. E.I. Du Pont de Nemours Co.*, 627 F.Supp. 358, 364 (D. Mass. 1985). Until the e-mail was produced on November 7th, the circulation of this correspondence was completely private and "inherently unknowable" and therefore, the statute of limitations should be tolled and the product disparagement claim should not be barred.

The assertion that HipSaver could have discovered the e-mail subject matter earlier is groundless. Posey's e-mail was sent to three Veteran Administration recipients at the following addresses: Robert.Weaver2@med.va.gov; Dorene.Opava-Rutter@med.va.gov; and, jim.mcfall@med.va.gov. **Exh. A**, E-mail and attachment dated Friday July 27, 2001. These are private e-mail addresses to which The HipSaver

Company did not and still does not have access. To the best of HipSaver's knowledge, the content of this communication was not published in publicly available media.¹

Further, these e-mail addresses do not identify the specific institution at which each of these individuals is employed as Posey's Opposition suggests. In fact, Posey itself has difficulty naming the affiliated institution since it identifies this institution as the "West Los Angeles Veteran's Administration Hospital" where no such hospital exists. Defendant's Opposition, p. 6; *See also* **Exh. B**, Veterans Administration Facilities Locator and Directory. Even during a recent deposition taken December 16th, 2005 (the same day that Defendant's opposition was filed), a Posey employee incorrectly identified the institution affiliated with these e-mail recipients as the "West Los Angeles Falls Clinic" No such institution exists by that name. *Id.*

B. HipSaver's Claim Was Not Released by the Settlement Agreement

The terms of paragraph 11 of the Settlement Agreement limit the release to claims which arise from or are related to the false advertising claims under 15 U.S.C. §§ 1125, 1117 and G.L. c.93A, §§ 2, 11:

Except for the obligations contained in this Agreement, HipSaver releases Posey, and all of its officers, directors, employees, agents, representatives, dealers, distributors, shareholders, attorneys, predecessors, successors, assigns, affiliates, related companies, or corporations connected with them from any and all claims, liabilities or causes of action, known or unknown, fixed or contingent, which arise from or are related to the false advertising claims under 15 U.S.C. §§ 1125, 1117 and G.L. c. 93A, §§ 2, 11 which were asserted or which could have been asserted in the Action for conduct which occurred prior to the date of this Agreement.

¹ Posey's marking of this e-mail and attachment as Attorney Eyes Only and its insistence that we file this exhibit under seal illustrates that even Posey considers this document to be protected from and inaccessible to third parties and is further evidence that the document was inherently unknowable.

The product disparagement claim does not arise from or relate to false advertising claims under 15 U.S.C. §§ 1125, 1117 and G.L. c.93A, §§ 2, 11. It is an independent cause of action that was not released by the 2004 Settlement Agreement.²

CONCLUSION

HipSaver's recent discovery of this e-mail correspondence created a basis for new allegations that were inherently unknowable to HipSaver before the documents were produced during the discovery period. Thus, in the interest of justice and fairness, HipSaver respectfully requests that this Court grant leave to amend its complaint.

THE HIPSAVER COMPANY, INC.
By its Attorneys,

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Dated: December 22, 2005

02820/00502 454781.1

² To the extent that this Court may determine that the language of this release is ambiguous, the Court has allowed all claims that could have been brought under the broadest interpretation of this Agreement. *See generally*, Hearing Transcript from HipSaver's Motion to Dismiss. A dispute regarding contract interpretation should not be the basis for denying HipSaver's motion to amend.

EXHIBIT A

FILED UNDER SEAL

EXHIBIT B

Department of Veterans Affairs

Facilities Locator & Directory

[Home](#)

[Browse Facilities](#) > [Interactive Map](#) > [Department of Veterans Affairs](#) > [California](#)

VA Central Offices

**National Cemetery
Administration
(NCA)**

[Gravesite Locator](#)

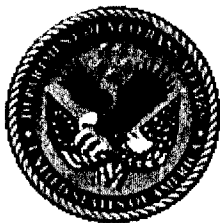
**Veterans Benefits
Administration
(VBA)**

**Veterans Health
Administration
(VHA)**

Facilities by State

**Interactive US
Map**

Facility Listing



California ([View addresses](#))

National Cemetery Administration

Memorial Service Network

Oakland: [Oakland Memorial Service Network](#)

National Cemetery

Gustine: [San Joaquin Valley National Cemetery](#)
Los Angeles: [Los Angeles National Cemetery](#)
Riverside: [Riverside National Cemetery](#)
San Bruno: [Golden Gate National Cemetery](#)
San Diego: [Fort Rosecrans National Cemetery](#)
San Francisco: [San Francisco National Cemetery](#)

Veterans Benefits Administration

Regional Office

Los Angeles: [Los Angeles Regional Office](#)
Oakland: [Oakland Regional Office](#)
San Diego: [San Diego Regional Office](#)

Veterans Health Administration

VISN

Long Beach: [VISN 22: Desert Pacific Healthcare Network](#)
Mare Island: [VISN 21: Sierra Pacific Network](#)

VA Medical Center

Fresno: [VA Central California Health Care System](#)
Livermore: [Livermore](#)
Loma Linda: [VA Loma Linda Healthcare System](#)
Long Beach: [VA Long Beach Healthcare System](#)
Los Angeles: [VA Greater Los Angeles Healthcare System \(GLA\)](#)
Menlo Park: [Menlo Park](#)
Palo Alto: [VA Palo Alto Health Care System](#)
Sacramento: [VA Northern California Health Care System](#)
San Diego: [VA San Diego Healthcare System](#)
San Francisco: [San Francisco VA Medical Center](#)

Outpatient Clinic

Atwater: [VA Castle OPC](#)
Auburn: [Sierra Foothills Outpatient Clinic](#)
Capitola: [Capitola Clinic](#)
Chico: [Chico Outpatient Clinic](#)
Eureka: [Eureka Veterans Clinic](#)

Fairfield:	<u>Fairfield Outpatient Clinic</u>
French Camp:	<u>Stockton Clinic</u>
Los Angeles:	<u>Los Angeles Ambulatory Care Center</u>
Los Angeles:	<u>West Los Angeles Ambulatory Care Center</u>
Martinez:	<u>Martinez Outpatient Clinic</u>
Modesto:	<u>Modesto Clinic</u>
Oakland:	<u>Oakland Mental Health Clinic</u>
Oakland:	<u>Oakland Outpatient Clinic</u>
Redding:	<u>Redding Outpatient Clinic</u>
Sacramento:	<u>McClellan Dental Clinic</u>
Sacramento:	<u>McClellan Outpatient Clinic</u>
Sacramento:	<u>Sacramento Mental Health Clinic</u>
San Diego:	<u>Mission Valley</u>
San Francisco:	<u>VA 13th & Mission Outpatient Clinic</u>
San Jose:	<u>San Jose Clinic</u>
Santa Barbara:	<u>Santa Barbara Community Based Outpatient Clinic</u>
Santa Rosa:	<u>Santa Rosa Clinic</u>
Seaside:	<u>Monterey Clinic</u>
Sepulveda:	<u>Sepulveda Ambulatory Care Center</u>
Sonora:	<u>Sonora Clinic</u>
Tulare:	<u>VA South Valley OPC</u>
Ukiah:	<u>VA Ukiah Community Based Outpatient Clinic</u>
Vallejo:	<u>Mare Island Outpatient Clinic</u>

Community Based Outpatient Clinic

Anaheim:	<u>Anaheim</u>
Bakersfield:	<u>Bakersfield Community Based Outpatient Clinic</u>
Brawley:	<u>Imperial Valley</u>
Chula Vista:	<u>Chula Vista (South Bay)</u>
City of Commerce:	<u>East Los Angeles</u>
Corona:	<u>Corona</u>
Escondido:	<u>Escondido</u>
Gardena:	<u>Gardena</u>
Lancaster:	<u>Antelope Valley</u>
Lynwood:	<u>South Central Los Angeles Community Based Outpatient Clinic</u>
Oxnard:	<u>Oxnard</u>
Palm Desert:	<u>Palm Desert</u>
San Bruno:	<u>VA San Bruno Outpatient Clinic</u>
San Gabriel:	<u>Pasadena</u>
San Luis Obispo:	<u>San Luis Obispo - Pacific Medical Plaza</u>
Santa Ana:	<u>Santa Ana - Bristol Medical Center</u>
Sun City:	<u>Sun City</u>
Upland:	<u>Upland</u>
Victorville:	<u>Victorville</u>
Vista:	<u>Vista</u>

Vet Center

Anaheim:	<u>Anaheim Vet Center</u>
Capitola:	<u>Santa Cruz County Vet Center</u>
Chico:	<u>Chico Vet Center</u>
Commerce:	<u>Commerce Vet Center</u>
Concord:	<u>Concord Vet Center</u>
Corona:	<u>Corona Vet Center</u>
Culver City:	<u>Culver City Vet Center</u>

Eureka:	<u>Eureka Vet Center</u>
Fresno:	<u>Fresno Vet Center</u>
Oakland:	<u>Oakland Vet Center</u>
Redwood City:	<u>Peninsula Vet Center</u>
Rohnert Park:	<u>Rohnert Park Vet Center</u>
Sacramento:	<u>Sacramento Vet Center</u>
San Diego:	<u>San Diego Vet Center</u>
San Francisco:	<u>San Francisco Vet Center</u>
Vista:	<u>Vista Vet Center</u>

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